IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5632

JAMES DEAN CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JAMES DEAN CLARK, who is now held in the Arizona State Prison at Florence, Arizona, asks leave to file the attached petition for writ of certiorari to the Supreme Court of Arizona without payment of costs and to proceed in forma pauperis pursuant to Rule 53, Rules of Supreme Court, 28 U.S.C.

The Petitioner's affidavit in support of this motion is attached.

JAMES K. KERLEY
Law Offices of Kerley & DeFrancesco
Attorney for Petitioner
1201 E. Fry Boulevard, Suite One
Sierra Vista, Arizona 85635

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STATE OF ARIZONA,

Respondent.

NOTICE OF FILING PETITION FOR WRIT OF CERTIORARI

TO: BEVERLY JENNEY, Cochise County Attorney, State of Arizona, Counsel for Respondent.

YOU ARE HEREBY NOTIFIED that a Petition for Writ of Certiorari in the above-entitled cause was mailed to the Supreme Court of the United States for filing on the 29th day of October, 1980.

A typewritten copy of the Petition and a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis with accompanying affidavit are served upon you herewith in accordance with Rule 33, Rules of the Supreme Court, 28 U.S.C.

James K. Kerley

JAMES K. KERLEY
Law Offices of Kerley & DeFrancesco
Attorney for Petitioner
1201 E. Fry Boulevard, Suite One
Sierra Vista, Arizona 85635

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TO: ROBERT CORBIN, Attorney General of the State of Arizona, Counsel for Respondent.

YOU ARE HEREBY NOTIFIED that a Petition for Writ of Certiorari in the above entitled cause was mailed to the Supreme Court of the United States for filing on the 29th day of October, 1980.

A typewritten copy of the Petition and a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis with accompanying Affidavit are served upon you herewith in accordance with Rule 33, Rules of the Supreme Court, 28 U.S.C.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, JAMES DEAN CLARK, through counsel, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this proceeding on July 25, 1980.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Arizona in this proceeding affirming Petitioner's sentence to death has been reported. State v. Clark, ___ Ariz. ___, ___ P.2d ___ (1980). A copy of the opinion has been appended to this Petition as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona affirming the order of the Cochise County Supreior Court sentencing the Petitioner to death was entered on July 25, 1980. See Appendix A. This Petition is timely filed pursuant to Rule 22(1), Rules of

the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I. Was the Defendant's right to confront and cross-examine the witness "John Doe" as provided in Smith v. Illinois, 370 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), at the preliminary hearing and at the trial violated because the witness wore a ski mask at the preliminary hearing and testified under an assumed name and refused to give his current address and because the defendant was precluded from asking the witness his true name and correct address at the trial for the reason that the trial Court precluded an examination into John Doe's true identity and correct address so that his employment as a DEA informant could be preserved?

II. Did the trial Court err when it questioned each prospective juror about their beliefs and views concerning capital punishment?

III. The re-drafting of the Arizona death penalty statute by the Arizona Supreme Court to cure constitutional infirmities was illegal.

A. It was constitutionally improper for the Arizona Supreme Court to re-draft the Arizona death penalty statute because the mitigation section of the unconstitutional statute was not severable from the remainder of the statute.

B. Application of the death penalty statute re-drafted by the Arizona Supreme Court violated the Ex Post Facto Clause.

C. Application of the court-drafted death penalty statute to the Petitioner violated the principles of fundamental fairness embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments.

D. The court-drafted death penalty statute violates the prohibition against judicially created penalties contained in the

Eighth and Fourteenth Amendments.

E. The court-drafted death penalty statute violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

CONSTITUTIONAL PROVISIONS

Article I, Section 10, Constitution of the United States:

"No State shall. . .pass any. . .ex post facto Law. . ."

Article VI, Constitution of the United States:

"This Constitution . . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

Amendment V, Constitution of the United States:

"(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;. . .nor be deprived of life, liberty or property, without due process of law. . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. . ."

Amendment VIII, Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV, Constitution of the United States:

". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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STATUTES

Arizona Revised Statutes, 1-246:

1-246. Penalty altered by subsequent law; effect

When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.

Section 5, Chapter 138, Thirty-First Arizona Legislature, First Regular Session, Arizona Revised Statutes, 13-454 (Renumbered A.R.S. 13-703 and modified effective October 1, 1978; modified effective May 1, 1979):

13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F, any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the

rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution.

3. He was a principal under section 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session:

Severability of sentence clause

In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years.

STATEMENT OF THE CASE

The Petitioner, JAMES DEAN CLARK, was charged by information with four counts of murder for allegedly violating A.R.S. 13-451, 13-452 and 13-453(A), all as amended. At the preliminary hearing, the State's principal witness against the Defendant testified wearing a ski mask and used the fictitious name "John Doe" and refused to reveal his current residence. On the record, Appellant's counsel alleged that such testimony violated the Appellant's right to confront the witnesses against him and to adequately cross-examine the witness.

Not until the Omnibus Hearing was the true name and address of John Doe revealed to the Defendant. The trial Court ordered that a copy of John Doe's FBI Rap Sheet was to also be supplied to the Appellant's counsel, but this was not done until immediately before the trial. Consequently, the Appellant and his counsel were prevented from investigating the background and character of the John Doe witness who later testified against the Appellant at trial.

Immediately preceding the testimony at trial of John Doe, an in camera hearing was had in order to determine whether or not Appellant and his counsel would be allowed to cross-examine John Doe concerning his true identity and his current residence. See

Appendix B. The record of the proceedings of June 14, 1978, clearly shows that John Doe did not wish to testify under his true name and did not wish to reveal his current residence in El Paso, Texas for the reason that he wished to maintain his status as a DEA informant. He was employed by the Drug Enforcement Administration as an informant in other cases, and he wished to maintain that employment. John Doe testified that he had some concern for his safety as an informant, but not as a witness in the case at bench. John Doe was not an informant in the case at bench. He was the principal State witness against the Defendant. The trial Judge ruled that John Doe did not have to reveal his true identity or address.

The trial Judge made such a ruling in order to preserve John Doe's employment and status as a DEA informant in other cases. The record clearly shows that John Doe was not concerned about his safety vis-a-vis the Appellant. He simply made certain vague references to alleged threats that he had heard a month earlier in a bar in El Paso. These threats were not related to his testimony in this case. They dealt with his status and activities as a DEA informant in other cases. The trial Judge committed an egregious constitutional error when it ruled that the Appellant in a capital case would not be allowed to cross-examine the principal witness against him and to ask his true identity and his correct address as provided in Smith vs. Illinois, 390 U.S. 127, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968).

During the jury selection process, the Court and the prosecution questioned each individual juror concerning their feelings and beliefs about the death penalty. This was vigorously objected to by Appellant's trial counsel. Appellant's trial counsel even went so far as to file a special action before the Arizona Supreme Court challenging this proceeding. This special action was denied by the Arizona Supreme Court.

After the jury was selected and the State presented its case, the Defendant was convicted of four counts of homicide.

Subsequent to the Defendant's conviction, the Court conducted a mitigation hearing. During the mitigation hearing process the Arizona Supreme Court rendered its decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253, Cert. denied 440 U.S. 924, 99 S.Ct. 1254, ____L.Ed.2nd ____ (1979). State v. Watson, supra, concerns the Arizona Supreme Court's interpretation of the death penalty statute passed by the Thirty-First Arizona Legislature.

The Thirty-First Arizona Legislature during its first regular session passed a new death penalty. A.R.S. 13-454 (re-numbered 13-703 effective October 1, 1978 and modified, subsequently modified effective May 1, 1979). The bill which eventually became law was Senate Bill 1005. When that bill was passed by the Arizona House, it included a provision which stated:

> "Evidence may be presented as to any matter the Sentencing Panel deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in sections b and c of this section." Journal of the House, Thirty-First Legislature, First Regular Session, p. 499. (Emphasis added).

That language was not enacted. Instead, the Senate version was passed which significantly restricted the number of mitigating circumstances that could be considered. As it was, the bill passed the Senate by only seventeen to twelve and received ten no votes and eight abstentions in the House. Journal of the Senate, Thirty-First Arizona Legislature, First Regular Session, p. 726. There could be no clearer statement of the Arizona Legislature's intent that mitigating circumstances be restricted.

There also can be no question about the legislative intent concerning what was to be done should a part of the statute be found unconstitutional. Section 10 of Senate Bill 1005 states unambiguously that persons sentenced to death shall be re-sentenced by the sentencing court to life imprisonment if the death penalty

is held to be unconstitutional. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.

In construing this statute before it was found unconstitutional by this Court, the Arizona Supreme Court was scrupulous in its construction. In case after case, the Court held that the trial judge who made the decision whether to invoke the death penalty was limited to considering "only those aggravating and mitigating factors listed in the statute. A.R.S. 13-454(D)." State v. Bishop, 118 Ariz. 263, 576 P.2d 122, 128 N. 4 (1978). The United States District Court for the District of Arizona, anticipating the action of this Court declared the Arizona death penalty unconstitutional because it restricted mitigation. Richmond v. Cardwell, 450 F.Supp. 519 (D.Az.1978).

A few months later, this Court decided Lockett v. Ohio, 438 U.S. 586 98 S.Ct. 2254, 57 L.Ed.2d 973 (1978) and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978).

A few weeks later, the Supreme Court of the State of Arizona responded in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). The Arizona Supreme Court was forced to hold:

> ". . .that A.R.S. 13-454(F), insofar as it limits the right of the defendant to show additional mitigating circumstances, is unconstitutional." 586 P.2d at 1257

Although the question of severability had not been briefed or argued in the Watson case, the Arizona Supreme Court went on to consider whether the unconstitutional portions of the death penalty statute were severable:

> ". . .so that the constitutional portion of the statute can remain in force and effect." 586 P.2d at 1257.

After opining that severability was solely a question of legislative intent, the Arizona Supreme Court reached a startling conclusion:

> "We can presume that had the Legislature been aware of the unconstitutionality of the limitation on mitigating circumstances, they would

> have enacted the remainder of the statute without what is now the offending portion. We hold that the statute with the portion deleted remains in force and effect." 586 P.2d at 1257

The Watson case was remanded for resentencing and the trial court was ordered to allow the defendant at resentencing:

> ". . .to present any mitigating circumstances tending to show why the death penalty should not be imposed." 586 P.2d at 1257

(Prior to Watson the Arizona Legislature renumbered the death penalty statute as A.R.S. 13-703 as a part of a general revision of Arizona's criminal code and added one mitigating factor: "The defendant's age." The renumbering and modification were effective October 1, 1978. After Watson the Arizona Legislature passed a modification of the death penalty statute which attempted to follow the guidelines on mitigation set forth in Watson. The modification was effective May 1, 1979. A.R.S. 1-246.)

The Watson, supra, case has been challenged by all inmates who are currently on death row in the Arizona State Prison at Florence, in a class action entitled Knapp v. Cardwell, ____ F.Supp. ____ (District Arizona 1980). The Appellant in the case at bench is a member of the class challenging the Watson, supra case. In Knapp v. Cardwell, the Federal Courts have issued a restraining order restraining the State of Arizona from executing any of the members of the class of persons who were sentenced under Watson until the constitutionality of the Watson case is ultimately decided by the Federal Courts. Because the Appellant is a member of that class, and because the State of Arizona is already restrained from excuting him, no additional restraining order from this Court shall be requested at this time.

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REASONS FOR GRANTING THIS PETITION

I. THERE IS A DRAMATIC CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS AND THE STATES' SUPREME COURTS OVER THE QUESTION OF THE CORRECT INTERPRETATION AND APPLICATION OF THIS COURT'S OPINION IN SMITH vs. ILLINOIS.

In Alford vs. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and more recently, in Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), this Court set forth the general rule which requires disclosure of the identity and address during the cross-examination of witnesses in criminal trials. In Alford and Smith, supra, this Court recognized a possible exception to the disclosure of the true identity and current address of a witness in a criminal trial when a question, which seeks to illicit such information, would tend "merely to harrass, annoy, or humiliate a witness." In Smith, supra, Mr. Justice White and Mr. Justice Marshall, wrote a separate concurring opinion. In this separate concurring opinion, Mr. Justice White and Mr. Justice Marshall stated that they would also recognize another category of questions other than those that might tend to harrass, annoy or humiliate a witness. This additional categary is "inquiries which tend to endanger the personal safety of the witness", State vs. Illinois, supra, 19 L.Ed.2d page 960. The majority opinion in Smith vs. Illinois , supra, did not recognize this additional exception to the general rule enumerated in Smith, supra. The Federal Circuit Courts have seized upon this additional exception suggested in the concurring opinion of Mr. Justice White and Mr. Justice Marshall and have carved out an additonal exception to the Smith principal in cases where the personal safety of the witness may be endangered. See United States vs. Daddano, 432 F.2d 1119, 1128 (Seventh Circuit 1970), Cert. denied 404 U.S. 905, 91 S.Ct. 1366, 28 L.Ed.2d 645 (1971); United States vs. Battaglia, 432 F.2d 1115 (Seventh Circuit 1970), Cert. denied 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); United States vs. Palermo, 410 F.2d 468 (472 Seventh Circuit 1969);

United States vs. Persico, 425 F.2d 1375, 1384 (Second Circuit 1970), Cert. denied 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970); United States vs. Baker, 419 F.2d 83, 87 (Second Circuit 1969), Cert. denied 397 U.S. 976, 90 S.Ct. 196, 25 L.Ed.2d 271 (1970).

The difference between the majority opinion in Smith, supra, and the separate concurring opinion of Messrs. Justice White and Marshall, has apparently led to conflicting interpretations of the holding in Smith, supra, in the Federal Circuit Courts. Only this Court can authoritatively set forth the correct parameters and application of Smith vs. Illinois, supra. The Federal Circuit Courts have applied and construed the holding in Smith vs. Illinois, supra, in a conflicting manner. The same conflict can also be seen within the same Circuit and between the Circuits and the State Supreme Courts and between the various State Supreme Courts.

The Federal Circuit Courts have interpretted the separate concurring opinion of Messrs. Justice White and Marshall as authorizing the restriction on the cross-examination of a witness in a criminal case when there existed a legitimate factual basis showing that the witness is in danger from the defendant. Caldwell vs. Minnesota, 536 F.2d 272 (Eighth Circuit 1976); McGrath vs. Vinzant, 528 F.2d 681 (First Circuit) Cert. dismissed, 426 U.S. 902 (1976); United States vs. Cavallaro, 553 F.2d 300 (Second Circuit 1977); United States vs. Hansen, 569 F.2d 407 (Fifth Circuit 1978); United States vs. Penick, 496 F.2d 1105 (Seventh Circuit) Cert. denied 419 U.S. 897 (1974); United States vs. Saletko, 452 F.2d 193 (Seventh Circuit 1971); United States vs. Herbert, 502 F.2d 890 (Tenth Circuit 1974); United States vs. Baker, 419 F.2d 83 (Second Circuit 1969); United States vs. Conder, 423 F.2d 904 (Sixth Circuit 1979); United States vs. Persico, supra.

Other opinions rendered by the various Federal Circuit Courts have interpretted Smith vs. Illinois, supra, as not requiring the revelation of a material witness's identity and address

in a criminal case, even when the inquiry into the witness's identity and address would not constitute harrassment, annoyance, humiliation or danger to the witness. See United States vs. Snaldone, 484 F.2d 311 (Tenth Circuit) Cert. denied 415 U.S. 915 (1974); United States vs. Thompson, 493 F.2d 305 (Ninth Circuit) Cert. denied 419 U.S. 834 (1974); United States vs. Keller, 412 F.2d 374 (Seventh Circuit 1969); United States vs. Lee, 413 F.2d 910 (Seventh Circuit 1969); United States vs. Lawler, 413 F.2d 622 (Seventh Circuit 1969); United States vs. Kartman, 417 F.2d 893 (Ninth Circuit 1969).

Only this Court can authoritatively correct the inconsistent and contradictory application of the holding in Smith vs. Illinois by resolving the disparate manner in which the Federal Circuit Courts have applied Smith vs. Illinois, supra. This Court should clarify for the Federal Circuits the circumstances under which Smith vs. Illinois, supra, is to be applied and should resolve the ambiguity between the majority opinion and the separate concurring opinion in Smith vs. Illinois. It is also respectfully pointed out to the Court that none of the above enumerated cases involved a capital case, such as the case at bench.

It is further respectfully submitted to this Court that the Federal Circuit Courts have applied Smith vs. Illinois in a manner inconsistent with this Court's holding in Smith, supra. The majority opinion in Smith vs. Illinois, supra, appears to lay down an iron clad holding, except when the questionning of the identity and true address of the witness would constitute harrassment, annoyance or humiliation to the witness. The majority opinion seems to represent a per se rule. However, the above enumerated Federal Circuit cases have not so interpretted Smith vs. Illinois, but have tended to adopt a rule of reason approach based upon the separate concurring opinion. This ambiguity or inconsistency between the Federal Circuits and this Court can only be resolved

by this Court clearly and distinctly setting forth the exact parameters of Smith vs. Illinois, supra.

The State Appellate Courts, including the State Supreme Courts, also appear to have construed and interpretted Smith vs. Illinois in inconsistent ways. For example, the Arizona Supreme Court in State vs. Baumann, ___ Ariz. ___, 610 P.2d 38 (1980), found that a witness in this criminal case did not have to reveal his address because of alleged concern for the safety of the witness vis-a-vis the defendant. The Arizona Supreme Court in effect followed the exception suggested in the separate concurring opinion in Smith vs. Illinois, supra.

Other appellate Courts in other States have ruled that the address, and in at least one case, the identity as well as the address, of the witness need not be revealed, even when there are no circumstances involving annoyance, harrassment, humiliation or danger. See People vs. Anderson, 257 N.E2d 594 (1970); People vs. Hall, 253 N.E.2d 890 (1969); People vs. Gonzalez, 257 N.E.2d 236 (1970).

Other State appellate Courts have followed the holding in State vs. Baumann, supra. See People vs. Abbott, 249 N.E.2nd 675 (1969); People vs. Dunams, 254 N.E.2d 582.

The contradictory and conflicting manner in which the State appellate Courts have applied Smith vs. Illinois, supra, can only be resolved by this Court rendering an appropriate opinion clearly delineating the holding in Smith vs. Illinois, supra, and authoritatively setting forth the circumstances under which Smith vs. Illinois shall be applied by the State appellate Courts.

The Arizona Supreme Court has applied the holding in Smith vs. Illinois, supra, inconsistently within its own jurisdiction. Other than the case at bench, it appears the only other opportunity that the Arizona Supreme Court has had to interpret Smith vs. Illinois, supra, is the State vs. Baumann, supra, case.

In State vs. Baumann, supra, the Arizona Supreme Court held that the witness need not reveal his address because of alleged legitimate concern for the witness's safety vis-a-vis the defendant. The Court appears to have followed the separate concurring opinion in Smith vs. Illinois of Messrs. Justice White and Marshall.

However, in the case at bench, State vs. Clark, the Arizona Supreme Court appears not to have followed even the concurring opinion of Messrs. Justice White and Marshall. The record before the trial judge, attached hereto as Appendix B, clearly shows that the John Doe witness was the principal witness against the defendant. The record also shows that the John Doe witness was not afraid for his safety vis-a-vis the defendant Clark. The John Doe witness specifically stated before the trial judge that he was not afraid of testifying in this case. John Doe stated emphatically that he wanted to testify under a false name, and he did not want to give his correct address because he wished to preserve his employment as a DEA informant in El Paso, Texas. The record clearly shows that this is why the trial judge ruled that the witness would not have to testify under his correct name and give his current address. There was no testimony presented whatsoever that the John Doe witness was in way in jeopardy vis-a-vis the defendant.

It is correct that the John Doe witness did testify about some vague threats to him that he overheard in a bar in El Paso. However, the substance of these threats appear to be related to his employment as a DEA informant. There was no evidence presented to the trial judge connecting the alleged threat to the John Doe witness to his testimony in the Clark case.

The facts in this case are similar to those found in United States vs. Ott, 489 F.2d 872 (Seventh Circuit 1973). In Ott, supra, the trial judge did not require a witness to testify and to give his current address for the reason that the government wished to protect the witness's employment. The Court found this

to be error in violation of the holding in Smith vs. Illinois, supra, but reversed upon other grounds.

The record clearly shows that the witness John Doe did in fact testify at the trial under an assumed name and did not reveal his true address. See Appendix C appended hereto.

It is respectfully submitted to this Court, that only this Court can correct the egregious error made by the trial Court in the case at bench, and that only this Court can authoritatively state whether or not the majority opinion in Smith vs. Illinois, is to be interpretted in light of the separate concurring opinion and whether or not a witness's true identity and address can be withheld from the jury under circumstances where the witness is not in any physical jeopardy vis-a-vis the defendant.

The record in the case at bench also clearly shows that the Appellant and his counsel were not given the identification and background information on the John Doe witness in sufficient time to investigate the John Doe witness and to prepare for his cross-examination at trila. See United States v. Marti, 421 F.2d 1263 (Second Circuit, 1970).

II. DID THE TRIAL COURT ERR WHEN IT QUESTIONED EACH PROSPECTIVE JUROR ABOUT THEIR BELIEFS AND VIEWS CONCERNING CAPITAL PUNISHMENT?

In Arizona, the law requires a bifurcated proceeding before a defendant can be sentenced to death. A.R.S. 13-454(A) provides that after a defendant is found guilty or pleads guilty to first degree murder, the Court shall then conduct a separate sentencing hearing. The Court, and only the Court, is empowered to impose the death penalty.

In Witherspoon vs. Illinois, 391 U.S. 510 (1968), this Court held that prospective jurors could be questioned about their views on the death penalty, and that those who were unalterably opposed to the death penalty and who, therefore, were incapable of

following the Court's instructions, could be challenged for cause by the State and excluded. However, in Illinois at that time, the jury both determined the defendant's guilt or innocence, and if the jury found the defendant guilty, the jury itself, not the Court, decided whether or not the death penalty should be imposed. Because Arizona follows a bifurcated proceeding and the jury does not impose the death penalty, and it is also instructed not to consider punishment, it is submitted to this Court that it is improper to question prospective jurors about their views on the death penalty and that to do so violates the defendant's constitutional rights.

In the case at bench, each individual juror was questioned individually concerning his views on the death penalty by the Court. At least seven jurors were questioned twice about their views on the death penalty. The questionning by the Court and by the prosecution of the jurors concerning their views about the death penalty was vigorously objected to at trial by the defense counsel.

Defense counsel argued that questionning the jurors about their views on the death penalty was in violation of the equal protection clause of the United States Constitution because neither the prosecution, nor the defense, in non-capital cases is allowed to inquire into the jurors' views or feelings about punishment. Defense counsel also argued that it was a denial of the equal protection clause of the United States Constitution not to be allowed to ask a counter-Witherspoon question in order to determine whether or not a juror might be prejudiced in favor of the death penalty and should, therefore, be excluded for that reason.

It is respectfully submitted to this Court that the mere questionning of jurors concerning their views on the death penalty in a bifurcated state violates the defendant's right, not only to equal protection, but to an impartial jury. This Court has repeatedly held that the denial of an impartial jury violates the

due process clause of the Fourteenth Amendment. This Court has also found that the denial of an impartial jury also violates the Sixth Amendment of the United States Constitution. Parker vs. Gladden, 385 U.S. 363 (1966); see also Turner vs. Louisiana, 379 U.S. 466 (1965); Gonzales vs. Deto, 405 U.S. 1052 (1972).

Only this Court can clarify whether or not Witherspoon, supra, is applicable in a State such as Arizona, which follows a bifurcated proceeding in the imposition of the death penalty. It is respectfully submitted to this Court that the holding behind the Witherspoon, supra, decision is not applicable to a bifurcated death penalty proceeding. Because the jury in the State of Arizona does not impose the death sentence, there is no need to inquire into the jurors' feelings or beliefs about the death penalty in order to empanel an impartial jury that will follow the Court's instructions. In the State of Arizona, the Court, not the jury, imposes the death penalty. It is a violation of the defendant's constitutional rights to allow the trial Court and/or the prosecution, in this case over defense objections, to ask each individual juror, and several of them twice, their beliefs and feelings concerning the Arizona death penalty.

III. THE DECISION TO SENTENCE PETITIONER TO DEATH CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT ON SEVERAL THEORIES.

A. Ex Post Facto and Due Process

The sentencing of Petitioner to death using a statute modified to pass constitutional muster after the date of the offense grossly conflicts with the prior decisions of this Court concerning the Ex Post Facto Clause and due process. Article I, Section 10 and Fourteenth Amendment, Constitution of the United States. Sentencing under a statute passed after the date of the offense has been held to be an ex post facto violation even if the sentence received under the new statute could also have been received under

the old statute. Lindsey v. Washington, 301 U.S. 397, 401, 47 S.Ct. 397, 81 L.Ed. 1182 (1937). In addition, judicial enlargement of a criminal statute after the crime has been committed to the disadvantage of the defendant or construction by a court of a statute in an unexpectedly broad manner are due process violations. Marks v. United States, 430 U.S. 188, 191-192, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Bouie v. City of Columbia, 387 U.S. 347, 353, 84 S.Ct. 1697, 12L.Ed.2d 894 (1964). It would be an understatement to say that the promulgation of a new death penalty statute by the Arizona Supreme Court was a "judicial enlargement" or reconstruction that was "unexpectedly broad". Accord, Hicks v. Oklahoma, ___ U.S. ___, 100 S.Ct. 2227, ___ L.Ed.2d ___ (1980) (holding that sentencing under an unconstitutional statute was improper even though the sentence received was within the limits allowed by general sentencing statute which should have been used. General sentencing provision applicable in this case was life imprisonment. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.

IV. THE ACTION OF THE ARIZONA SUPREME COURT IN RE-DRAFTING THE PREVIOUSLY UNCONSTITUTIONAL ARIZONA DEATH PENALTY STATUTE TO MAKE IT CONSTITUTIONAL IS INCONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER STATE COURTS.

There can be no serious question, but that the Arizona Supreme Court re-wrote the Arizona death penalty statute when it rendered its opinion in State v. Watson, 586 P.2d at 1253. (But see Knapp v. Cardwell, ___ F.Supp. ___ (D.Az. 1980) allowing the Arizona Supreme Court to "re-interpret" its death penalty statute. Knapp is presently on appeal to the Ninth Circuit Court of Appeals. The appeal has been indefinitely stayed pending resolution in state court of challenges by the State of Arizona to the representation of Petitioner and other death row inmates by Public Defenders in Federal Court.) Without the aid of briefing or argument on the point, the Arizona Supreme Court attempted in Watson to sever

the unconstitutional limitation on mitigation in the Arizona death penalty statute in Watson and add a provision to the statute allowing anything to be introduced in the way of mitigation. 586 P.2d at 1257.

The action of the Arizona Supreme Court in Watson was not severance. As Justice Brandeis has noted, severability presents two questions: (1) whether the statute minus the offending language can stand alone, and (2) whether the state legislature intended that the unobjectionable portion of the statute be able to stand alone if the remainder of the statute were struck down. Dorchy v. State of Kansas, 264 U.S. 286, 291, 44 S.Ct. 323, 68 L.Ed. 686 (1924). The Arizona Supreme Court's bald-faced assertion that the Arizona Legislature intended to pass a constitutional statute and, therefore, intended that the Arizona death penalty statute be severable, that is, that the mitigating factors section be severable from the remainder of the statute, is clearly erroneous. It should be noted that the Arizona Supreme Court did not even mention in its original Watson opinion the provision passed by the Arizona Legislature with the original version of A.R.S. 13-454 that stated unambiguously that persons sentenced to death shall be resentenced by the sentencing court to life imprisonment if the death penalty is held to be unconstitutional. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.

In addition to the incredible "finding" of legislative intent to allow severability, the action of the Arizona Supreme Court in deleting the mitigation section (subsection F) and the references to subsection F throughout the remainder of the statute make the death penalty statute completely unintelligible. There is no severance, where the remainder of the statute cannot stand alone. Dorchy v. State of Kansas, supra.

This Court established sound precedent in refusing to re-draft death penalty statutes which have been held unconstitutional

United States v. Jackson, 390 U.S. 470, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Accord, United States v. Narciso, 446 F.Supp. 252 (E.D. Mich. 1977). Arizona case authority prior to Watson is in accord with the federal authority on this point. See, e.g., Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); State ex rel. Berger v. Superior Court, 106 Ariz. 365, 476 P.2d 666 (1970). Every State court that has been invited to re-draft a state death penalty to make it constitutional has declined except for Arizona and Mississippi. See, e.g., Rockwell v. Superior Court, 18 Cal.3d 420, 556 P.2d 1101, 134 Cal.Rptr. 650 (1976); State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); French v. State, 362 N.E.2d 834, (Ind. 1977); Bond v. State, 403 N.E.2d 812 (Ind. 1980); Riggs v. Branch, 554 P.2d 823 (Okla. Cr. 1976); State v. Cline, 397 A.2d 1309 (R.I. 1979); Kennedy v. State, 559 P.2d 1014 (Wyom 1977). But see, State v. Watson, supra; Jackson v. State, 337 S0.2d 1242 (Miss. 1976). Only this Court can resolve the tremendous conflict between the states over the ability of a state court to legislate a death penalty and apply it retrospectively and prospectively.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. It is made applicable to the states by the Fourteenth Amendment. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

Historical analysis reveals that the framers of the Constitution borrowed the cruel and unusual punishment proscription from the Tenth Clause of the English Bill of Rights of 1689. This Clause was in large part directed against the "punishments unauthorized by statute and beyond the jurisdiction of the sentencing court." Gregg v. Georgia, 428 U.S. 153, 169, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See also 5 Blackstone, Commentaries on the Law of England, pp. 377-379 (Tucker ed. 1803).

The imposition of penalties not authorized by statutes is so abhorrent that this Court has for over a century considered

it to violate the Due Process Clause in addition to the Eighth Amendment. Ex Parte Lange, 83 U.S. (18 Wall.) 163 (1874).

Article IV, Section 4 of the United States Constitution guarantees to the citizens of every state a republican form of state government. The republican form of government envisioned by the founding fathers is a government of separate, co-equal branches. Separation of powers means that judges "can exercise no executive prerogative. . .nor any legislative function. . . ." J. Madison, The Federalist Papers, No. 47, pp. 301, 303, Mentor Book (1961). Madison relied upon Montesquieu's theory of a republican form of government in defending the Guarantee Clause of the Constitution. Montesquieu is unequivocal on the subject of judicial exercise of legislative power:

> "(T)here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator." Montesquieu, The Spirit of the Laws, Book XI, p. 152, Hafner Publishing Company (1966).

Although this Court has recently observed that the doctrine of separation of powers embodied in the federal constitution is not mandatory on the states, it has indicated that the Due Process Clause of the Fourteenth Amendment "presumably prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." Whalen v. United States, ___ U.S. ___ 100 S.Ct. 1432, 4136-1437 n.4, ___ L.Ed2d ___ (1980).

Only this Court can insure that citizens of the State of Arizona will not fall prey to legislative action by the Arizona Supreme Court which has the effect of depriving the Petitioner of his life.

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CONCLUSION

For the reasons stated above, Petitioner requests that this Court issue a Writ of Certiorari to the Supreme Court of the State of Arizona in this case.

Respectfully submitted this 27th day of October, 1980.

JAMES K. KERLEY
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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee, v. JAMES DEAN CLARK, Appellant.	No. 4346

FILED
JUL 25 1980
MARYANN HOPKINS YOUNG
CLERK SUPREME COURT

Appeal from the Superior Court of Cochise County

Cause No. 9602

The Honorable Anthony T. Deddens

AFFIRMED

Mr. Robert K. Corbin, Attorney General
by William J. Schafer III, Chief Counsel, Criminal Division
by Jessica L. Gifford, Ass't Attorney General
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HOLOHAN, Vice Chief Justice

Appellant, James Dean Clark, was convicted after a trial by a jury of four counts of first-degree murder. He was sentenced to death on each count. A timely appeal was filed. We have jurisdiction pursuant to A.R.S. § 13-4031.

The essential facts are that for a year prior to the murders appellant worked as a wrangler at a dude ranch owned by Mr. and Mrs. Charles Thumm located near Elfrida, Arizona. In the early morning hours of December 4, 1977, appellant murdered four persons.

Beginning in the wranglers' quarters, he stabbed to death an older wrangler who was "passed out" in his bed and then shot to death a young wrangler as he slept in his sleeping bag. Appellant next picked up a .357 Magnum from the young wrangler's room, walked from the quarters to the Thumms' house and shot to death both Mr. and Mrs. Thumm. After slashing the tires on all vehicles remaining at the ranch, appellant fled the area in the Thumms' station wagon, taking with him rings and credit cards belonging to the Thumms, guns, including those used in the murders, and a saddle. He was apprehended a few days later in El Paso, Texas.

The issues on appeal are:

1) Did the trial court err in questioning prospective jurors about their views on capital punishment?

2) Did the trial court erroneously deny appellant's request to tape-record the trial?

3) Was appellant's right to confront witnesses violated by John Doe's appearance at the preliminary hearing or at trial?

4) Was appellant denied the right to counsel when he made statements without the presence of counsel?

5) Were photographs of the victims erroneously admitted?

6) Did the trial court err in admitting into evidence a bloodstained pillow?

7) Did the trial court err in refusing to grant a mistrial because the courtroom door was locked for a short time?

8) Did the trial court err in refusing a curative instruction regarding a lapse of time between appellant's arrest and his exculpatory John Doe murder story?

9) Were the jury instructions including a flight instruction erroneous?

10) Is the death penalty unconstitutional, either per se, as violative of the Eighth Amendment or because it excludes the jury from participation?

11) Is the holding of this court in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) correct?

12) Did the trial court err in finding three aggravating circumstances and no mitigating circumstances?

Appellant asserts that it was a violation of his right to an impartial jury for the trial court to ask prospective jurors if their opinions on capital punishment would prevent them from making a fair and impartial decision as to appellant's guilt or innocence. He points out that the Arizona system in capital cases is a bifurcated proceeding in which the jury decides guilt or innocence but has no role in deciding the sentence; therefore, he argues that the issue of capital punishment is irrelevant to the jury's consideration and should not be asked.

In State v. Ramirez, 116 Ariz. 259, 569 P.2d 201 (1977), we resolved the issue contrary to the appellant's position. In Ramirez, we ruled that although veniremen may recognize that the jury does not impose the sentence under Arizona law, the prosecution may inquire whether their attitude toward the death penalty would prevent them from making an impartial decision. In this case, no prospective juror was struck for cause simply because of his or her scrupples about the death penalty. The trial court carefully followed the mandates of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), in conducting the voir dire of the jury. See also Adams v. Texas ____ U.S. ____, ____ S. Ct. ____, ____ L.Ed.2d ____ (1980)(48LW4869). The voir dire and selection of the jury was carried out in conformity with constitutional standards.

Appellant alleges that he was denied the effective assistance of counsel by the trial court's denial of his request to tape-record the proceedings. Appellant cites 67 A.L.R.3d 1013 and Davey v. City of Atlanta, 130 Ga. App. 687, 204 S.E.2d 322 (1974), as support

for this proposition. However, Davey, supra, involved a non-record court. Denial of permission to tape the proceedings was not error where an official court reporter was present who could have provided partial transcripts if requested. The trial court's denial of permission to tape the proceedings was not error under the circumstances.

Appellant contends that his right to confront witnesses against him, guaranteed by the Sixth Amendment to the United States Constitution, was denied both at the preliminary hearing and at the trial. The specific instances which form appellant's complaint involve the appearance of John Doe, a witness for the state at the preliminary hearing and later at the trial. The witness did not give his true name or address at the preliminary hearing or at trial. At the preliminary hearing the witness wore a ski mask to hide his identity, but he did remove the mask briefly so that appellant could see him.

Based on Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L.Ed.2d 956 (1968) and Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), appellant maintains that the trial court committed error by not requiring a new preliminary hearing and by restricting the defense at trial from cross-examining the witness to determine his name and address.

The limitation on cross-examination at the preliminary hearing was not error. The appellant was acquainted with the witness, and he had occasion to be with him in El Paso. The full details of the witness' activities prior to meeting the appellant may not have been known, but the development of such information was a subject more properly covered by the discovery procedure of the Criminal Rules rather than the preliminary hearing. See Rule 15, Rules of Criminal Procedure.

A greater restriction upon the examination of witnesses is permissible at the preliminary examination stage of the criminal process because the preliminary hearing is limited to the determination of probable cause to hold the defendant to answer for an offense. It is not the purpose of the preliminary examination to provide a means for the discovery of evidence. State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975). The Rules of Criminal Procedure provide a separate and adequate means for the defense to discover the evidence.

Restriction on cross-examination at trial is another matter. In State v. Fleming, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977), we stated:

> "Distinctions between reasonable limitations on the scope of cross-examination and unnecessary restrictions on the right to confront witnesses are, however, difficult to draw and must be considered on a case-by-case basis. The test is whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness."

Prior to the trial of this case the court ordered that the prosecution disclose to defense counsel John Doe's name and felony record. On the day that John Doe was to testify, the trial court conducted proceedings in chambers with both the prosecutor and defense counsel present. During this hearing John Doe disclosed his real name and the name of the religious retreat where he was currently living. The trial court inquired into the nature of the threat to the personal safety of John Doe, determined the threat was real and ruled, over defense counsel's objection, that John Doe's real name not be revealed to the jury.

At trial, John Doe's address was given as a religious retreat in El Paso. He acknowledged his prior felonies and his activities as a paid Drug Enforcement Administration informer, heroin addict, procurer of prostitutes and con artist raising money to support his heroin habit.

John Doe's testimony against the appellant dealt with their meeting in El Paso, their activities there, and the state-

ment made by appellant concerning the shooting of Charles Thumm. The defense counsel extensively cross-examined John Doe and developed the impeachment material which had been disclosed.

The record of this case is unlike that in either Alford or Smith. The defense was not denied the opportunity to develop the information necessary to attack the credibility of the witness. The defense was not denied access to the true identity of the witness. The withholding of the witness' true name was limited to the jury and the public. Justice White in his concurring opinion in Smith specifically recognized as an exception "inquiries which tend to endanger the personal safety of the witness." 390 U.S. at 133-4, 88 S. Ct. at 751, and courts have repeatedly recognized that precautionary measures must be taken when a witness' safety is at stake. See, e.g., U.S. v. Herbert, 502 F.2d 890 (10th Cir. 1974), cert. denied 420 U.S. 931, 95 S. Ct. 1134, 43 L.Ed.2d 403; U.S. v. Smaldone, 484 F 2d 311 (10th Cir. 1973), cert. denied 415 U.S. 915, 94 S. Ct. 1411, 39 L.Ed.2d 469; U.S. v. Saletko, 452 F.2d 193 (7th Cir. 1971), cert. denied 405 U.S. 1040, 92 S. Ct. 1311, 31 L.Ed.2d 581.

State v. Baumann, ____ Ariz. ____, 610 P.2d 38 (1980), presented an analogous situation to the case at bar in that the witness' current address was withheld over objection. In Baumann we upheld the trial court's exercise of discretion because the witness had been thoroughly cross-examined on every aspect relating to the case and to his credibility.

As in Baumann, appellant took advantage of the ample opportunities presented to impeach John Doe. All aspects of the case and factors bearing on credibility were explored. Appellant was not prejudiced by withholding John Doe's real name from the jury. There was no error in the ruling of the trial judge on this point.

Appellant urges us to hold that statements by the defendant made during incarceration were involuntary despite a clear waiver in each instance of his Miranda rights. Appellant concedes that

the record does seem to suggest that the statements were made voluntarily and in fact trial counsel did not object to their admission into evidence but, relying on Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1977), he asserts that any questioning during incarceration without the knowledge, approval or participation of counsel denies him the assistance of counsel.

Appellant made three statements to the primary investigating officer in the case. The first statement was made December 9, 1977, as appellant was transported from El Paso to Bisbee. Counsel had not yet been appointed. The second statement was made on January 10, 1978. Although counsel had been appointed, appellant specifically requested that an officer come to talk with him about the crime. On January 12, 1978, appellant again specifically asked that the same officer visit him. The officer who took the statements testified that he asked appellant if defense counsel was aware of the meeting and did appellant want to talk to defense counsel prior to the interview. Appellant replied that he did not want to talk to defense counsel but wanted to go into more detail concerning the murders. In these second and third interviews appellant blamed the murders on the John Doe from El Paso

The defense counsel had advised appellant not to make any statements until his version of how the crime occurred could be investigated, but appellant disregarded his advice.

Unlike Brewer v. Williams, supra, the appellant had requested the interview with the officer and appellant had been reminded of his right to have his attorney present. Under the circumstances shown by the evidence, the trial court found that the defendant had waived his Sixth Amendment rights, and the record supports this finding.

Appellant complains that photographs of the victims' bodies were so gruesome and "heinous" that they inflamed the jury and that it was an abuse of discretion to allow them to be introduced into evidence

Trial courts have great discretion in the admission of photographs. State v. Smith, 123 Ariz. 243, 599 P.2d 199 (1979); State v. Morales, 120 Ariz. 517, 587 P.2d 236 (1978). As long as the photograph has some probative value it is admissible even if inflammatory. State v. Caldwell, 117 Ariz. 464, 573 P.2d 864 (1977). Reasons for admission include identification of the deceased, to show the location of mortal wounds, to illustrate how the crime was committed, and to aid the jury in understanding testimony. State v. Morales, supra. The photographs at issue here illustrated witness' testimony in several particulars including how the crime was committed and the location of wounds. The photographs admitted in evidence were those which presented the relevant information in the least objectionable form. We find no abuse of discretion in the admission of the photographs.

Appellant contends that he was denied a fair trial by the admission into evidence of a bloodstained pillow with a bullet hole in it. The pillow had been found under Mrs. Thumm's head. A bullet jacket[1] found in the pillow matched a bullet core[2] found among the clothes appellant had left in his El Paso hotel room. Laboratory tests on the bullet core revealed fragments of organic matter that could have been bone and fibers that were similar to those of the pillow cover. Thus the prosecution argued that the pillow was a necessary link in this chain of evidence substantially linking appellant with the crimes.

Under Rule 403, Rules of Evidence, 17A A.R.S., otherwise relevant evidence is properly excluded if its probative value is outweighed by various factors including unfair prejudice.

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[1] A bullet jacket is the copper alloy outer shell of what is known as a jacket bullet which contains a lead core surrounded by a copper alloy shell.

[2] The lead portion of the bullet.

The weighing and balancing under Rule 403 is within the discretion of the trial court and will not be disturbed on appeal unless it has been clearly abused. State v. Smith, supra. If gruesome evidence is admitted for the sole purpose of inflaming the jury, we will of course reverse on appeal. State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978). This was not the case here, and we find no abuse of discretion by the trial court in allowing the admission of evidence of the pillow.

The appellant contends he was denied the right to a public trial because the courtroom was closed to members of the public during the trial. The incident referred to by appellant occurred on the morning of June 21, 1978, when the courtroom was not availabl to members of the public for about 30 minutes. A deputy sheriff had advised spectators that they must wait for the morning recess before entering the courtroom to avoid distracting the proceedings. The matter was called to the trial court's attention, and the trial judge made it clear that no such restriction had ever been authorized or approved by him.

The trial judge denied the defense motion for mistrial. The tri court found that the incident had been of extremely short duration, immediately corrected when discovered, and there had been no prejudic to the defense. We agree with the ruling of the trial court, and we note that the incident is similar to that described in State v. Von Reeden, 104 Ariz. 404, 454 P.2d 149 (1969), where we also concluded that the defendant's constitutional right to a public trial had not been violated when the courtroom had been closed to the public for a brief period of time.

Appellant argues without citation of authority that the trial court erred in denying a request for a curative instruction regarding the reason for the time lapse between the preliminary hearing and appellant's explanation as to how the murders occurred. When first arrested in El Paso, appellant signed a statement explaining his presence in El Paso as a vacation. Appellant's preliminary hearing was held on December 15, 1977, and on January 10, 1978, appellant gave a different story blaming the murders

on the John Doe from El Paso. The prosecutor argued in closing that this second story was concocted. Defense counsel asked for a curative instruction directing the jury not to consider this time lapse because there was a legal explanation for it. Defense counsel then stated to the trial court that he had directed appellant not to give the second statement until after investigation. This explanation for the time lapse was not in evidence. The trial court declined to give a curative instruction because such an instruction would be a comment on the evidence, would involve discussing matters not in the record and because the prosecutor's remarks were a fair comment on the evidence.

The ruling of the trial court was correct. There was no evidence in the record to support the instruction.

Appellant argues that a flight instruction was inappropriate in the case at bar because appellant was neither pursued after he left the scene of the crimes nor did he conceal himself. Merely leaving the scene of a crime is not evidence of flight. Before a flight instruction can be given there must be evidence of open flight as upon pursuit, or there must be evidence of concealment. State v. Rodgers, 103 Ariz. 393, 442 P.2d 840 (1968); State v. Smith, 113 Ariz. 298, 552 P.2d 1192 (1976). The manner of leaving the scene of the crime must reveal a consciousness of guilt. State v. Bailey, 107 Ariz. 451, 489 P.2d 261 (1971); State v. Rodgers, supra. Even without pursuit, a defendant's manner of leaving the scene may manifest consciousness of guilt. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979).

Appellant suddenly left the ranch which had been home for a year without a word to anyone. He left no information of where he was going. The tires on all vehicles remaining at the ranch were slashed. Appellant was found in possession of his employers' car and credit card. At the time he left the ranch the appellant was not pursued by the police, but we conclude that there was sufficient evidence to show that appellant's leaving was in order to avoid arrest and with a consciousness of guilt. It was proper to give a flight instruction.

In passing, we note that the flight instruction given in this case adequately covered the issue, but the Recommended Arizona Jury Instruction on flight is the preferred one.

Appellant also claims the trial court erred in refusing to give several other instructions tendered by the defense. We have carefully examined the instructions and reiterate our holding in State v. Taylor, 109 Ariz. 267, 508 P.2d 731 (1973) that if the issues are adequately covered by the instructions given, it is not error to refuse to single out a particular element for a special instruction. The instructions, read as a whole, adequately state the law. State v. Childs, 113 Ariz. 318, 553 P.2d 1192 (1976). We find no error.

State v. Watson, 120 Ariz. 441, 586 P.2d 1253, cert. denied. 440 U.S. 924, 99 S. Ct. 1254, ____ L.Ed.2d____ (1979), and State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S. Ct. 2988, 53 L.Ed.2d 1101 (1977) are dispositive of appellant's issue regarding the constitutionality of Arizona's death penalty statute.

As to the continued vitality of the Watson decision, we have repeatedly reaffirmed Watson in recent decisions. See, e.g., State v. Evans, ____ Ariz. ____, 606 P.2d 16 (1980); State v. Arnett, ____ Ariz. ____, 608 P.2d 778 (1980); State v. Mata, ____ Ariz. ____, 609 P.2d 48 (1980). We continue to adhere to the views expressed in Watson.

Appellant challenges the trial court's imposition of the death penalty, asserting that the trial court erroneously found three aggravating factors and no mitigating factors. We note that pursuant to State v. Watson, supra, which had been rendered during the mitigation hearing, the trial court continued the hearing on sentencing for one week to allow appellant to present any and all mitigating factors. Defense counsel argues that the trial court erroneously ordered that the state could present any aggravating circumstances, not limited to the statutory aggravating circumstances.

The record reveals, however, that the state relied upon the evidence presented during the trial for the aggravating circumstances. No new evidence on behalf of the state was presented at the sentencing hearing. Also, in closing argument at the hearing, the prosecutor stated that he was relying solely upon the statutory aggravating circumstances. Thus the trial court's order allowing the state to present aggravating circumstances in addition to those in the statute, although clearly erroneous, resulted in no prejudice to appellant.

The trial court found the following aggravating factors:

1) That appellant created a grave risk of death to a second victim, Mrs. Thumm, in shooting Mr. Thumm in the hallway of their home;

2) that appellant committed the murders of Mr. and Mrs. Thumm with the expectation of receiving something of pecuniary value, to-wit: Credit cards, jewelry and an automobile;

3) that appellant committed the offenses in an especially cruel and depraved manner.

First we address the "grave risk of death" issue. In State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977), we affirmed the trial court's finding that this aggravating circumstance was present where the defendant shot the victim in a crowded college auditorium and in fact wounded another student. In State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977), a similar finding was affirmed where the defendant shot the victims and injured another person in a bar with several people in it.

Although it is unclear in the case at bar exactly where Mrs. Thumm was at the time of Mr. Thumm's death, the evidence indicated that she was in another room. Even given the ricocheting of bullets, Mrs. Thumm was not close enough to be within any sort of "zone of danger." This is not the sort of crowded bar or auditorium situation present in Blazak and Doss. Thus, we find that the trial court erroneously found grave risk of death as an aggravating circumstance.

The trial court also found that appellant committed the murders with the expectation of receiving something of pecuniary gain. A.R.S. § 13-454(E)(5)[3] reads:

> "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

Appellant contends that the trial court incorrectly concluded that the above aggravating circumstance was present in this murder. He argues that the clear import of the fifth aggravating circumstance is that it applies only to the "hired gun" situation. Since there is no evidence that the appellant was hired or expected to be paid for killing the victims, he contends that the evidence does not justify the finding made by the trial court.

We do not read the statute in the limited fashion suggested by appellant. In State v. Madsen, ____ Ariz. ____, 609 P.2d 1046 (1980), we held that A.R.S. § 13-454(E)(5) applied to a murder committed for financial gain. We noted that if the receipt of money is established as a cause of the murder then the fifth aggravating circumstance would have been established. In Madsen we rejected the state's contention that the evidence proved that the defendant murdered his wife to collect the life insurance proceeds. We pointed out, however, that if the murder had been committed for a financial motivation it would have constituted an aggravating circumstance.

Unlike Madsen the evidence in this case supports the position of the trial court that the murder of the Thumms was committed for financial gain. After killing the Thumms the appellant took their credit cards, some money, two valuable diamond rings, and their 1976 Chevrolet station wagon. The circumstances surrounding the total episode reflect that the expectation of financial gain

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[3] Currently A.R.S § 13-703(F)(5).

was a cause of the murders.

Another aggravating circumstance found by the trial court was that the murders were committed in an especially cruel and depraved manner. A.R.S. § 13-454 (E)(6); A.R.S. § 13-703(E)(6), 1978 Criminal Code. The language of (E)(6) has been the subject of several of our decisions. State v. Richmond, supra; State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977); State v. Watson, supra; State v. Ceja, ____ Ariz. ____, ____P.2d ____ (1980), (No. 3101-2 filed May 19, 1980). As pointed out in Knapp the words used have meanings that are clear to a person of average intelligence and understanding. In Knapp we set out the definitions used by the dictionary for the terms heinous, cruel and depraved.

In the second Ceja case we pointed out that the cruelty referred to in the statute involved the pain and the mental and physical distress visited upon the victims. Heinous and depraved as used in the same statute meant the mental state and attitude of the perpetrator as reflected in his words and actions. We also noted in the second Ceja that it was not necessary that all three elements, heinous, cruel, or depraved, be present in the murder. The statutory expression is in the disjunctive, so either all or one could constitute an aggravating circumstance.

The trial judge found the murder to be committed in an especially cruel manner. As defined by our previous decisions, the evidence does not support this finding. There is no evidence that any of the victims suffered any pain. The fatal wounds appear to have been delivered at vital parts of the bodies of the victims, and death ensued swiftly.

The trial judge found the murders to have been committed in an especially depraved manner. We agree.

The evidence shows that the appellant was totally without regard for human life. Without justification or excuse, he killed four human beings. Two of his victim's, the Thumms, had provided

work and a home to appellant after he had been released from a juvenile correctional institution. The third victim, a young man seventeen years of age, had supposedly been a friend of the appellant. These factors did not dissuade him from his brutal task. His state of mind is illustrated by his comment to John Doe in El Paso to the effect that, "You should have seen Charley when I hit him with those cutters." In addition it must be noted that the appellant kept a spent bullet as a grissly souvenir of his crime. We believe that the evidence fully supports the finding of the trial court that the acts of the appellant constitute an aggravating circumstance under subsection (E)(6) of the statute.

In mitigation the appellant points out his youth (20 years of age), poor home life during his formative years, his lack of adult criminal record, and his emotional problems produced by an anti-social personality. All of which appellant argues should require the conclusion that the mitigating circumstances are sufficiently substantial to call for leniency. The trial court found that there were no mitigating circumstances shown which were sufficiently substantial to call for leniency. Appellant suggested that the trial court did not consider any mitigation which was offered. We reject this conclusion and note that the trial judge carefully reviewed the evidence offered in mitigation. After such careful consideration, he concluded that it was not sufficiently substantial to call for leniency.

From our independent review of the evidence in capital cases, State v. Richmond, supra, we conclude that the aggravating circumstances described before have been established and the mitigating

circumstances are not sufficiently substantial to call for leniency; therefore, the judgment and sentence are affirmed as to all counts.

WILLIAM A. HOLOHAN, Vice Chief Justice

CONCURRING:

FRED C. STRUCKMEYER, JR., Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

GORDON, Justice (Specially Concurring):

Although I would affirm both the judgment and sentence, I disagree with the majority's conclusion that the killing of the Thumms was committed in expectation of the receipt of something of pecuniary value. Reading former A.R.S. § 13-454E(4) and (5) together, I believe that the Legislature intended only to include the situation where defendant is a hired killer.

A.R.S. § 13-454E(4) and (5) provides:

> "4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
>
> "5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

Paragraph 4 applies to the procurer of the offense whether he has paid the killer prior to the offense or has promised to pay after the murder has been committed. Paragraph 5 parallels the preceding paragraph by applying to the killer whether he has been paid at the time of the offense or expects to receive payment in the future.

By extending the meaning of A.R.S. § 13-454E(5) to the instant case, the majority has included a killing in the perpetration of a robbery as an aggravating circumstance. The

Legislature, had it so intended, could have accomplished this result with more precise, specific language.

FRANK X. GORDON, JR.
Justice

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. JAMES DEAN CLARK, Defendant.	No. 9602

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEALED RECORD

APPEARANCES:

For Plaintiff — MR. JOSEPH M. FULLER
Deputy County Attorney

For Defendant — MR. ARTHUR C. ATONNA
Attorney-At-Law
P.O. Box 1182
Douglas, Arizona 85607

BE IT REMEMBERED that on the 14th day of June, 1978, the above-entitled matter came on for hearing before the Honorable Anthony T. Deddens, Judge of the Superior Court, at which time the following proceedings were had.

P R O C E E D I N G S

Bisbee, Arizona, Wednesday, June 14th, 1978.

THE COURT: The record may show these proceedings in chambers; in chambers proceedings with Mr. Vance and Mr. Atonna

present and Mr. Fuller from the County Attorney's Office present.

Your name, sir?

THE WITNESS: John Doe.

THE COURT: Okay, sir. This record, the Court wants the Court Reporter to understand is a sealed, to be a sealed record, and so we want to know what your true name is, sir?

THE WITNESS: James Morrison Kooper.

E X A M I N A T I O N

BY THE COURT:

Q Where do you live?

A. El Paso, Texas.

Q Street address?

A. There is none.

Q There isn't any?

A. I am in a religious retreat now. That is not a standard address.

Q That is not?

A. No.

Q What retreat house are you in?

A. The Christian Home.

Q The County Attorney claims that he wants your true identity of John Kooper to be withheld from the public in the courtroom, using the name and answering to the name John Doe, on the grounds that your life may be in danger, sir?

A. Yes.

Q Suppose you tell me reasons why you think your life may be in danger if your true name is disclosed.

A. With reporters in the courtroom, I am a DEA informant and I have got open cases in El Paso County, Texas. They have already got suspicion that I am informing in this case. My life has been threatened already because of that.

Q Okay.

A. Not as to do with this case, but as to do that I am informing.

THE COURT: The record may show that Mr. Hemenway just came in chambers.

By whom was your life threatened, sir, do you know?

A. No, it is just Mexican Americans.

Q (continuining by the Court) Have you been informing on people engaging in the drug traffic?

A. Yes, in El Paso, Texas.

Q And across the line from Juarez to the United States?

A. Yes, sir.

Q And, when did this threat come to you, sir?

A. It has been about a month ago now.

Q And, by what means?

A. I overheard it in a bar then a friend of mine told me that: They are going to kill you, man, be very careful, you know, your life is in danger, be really careful, you know.

Q Have you heard anything from the DEA concerning this, sir?

A I told them. I told them that my life was in danger and --

Q Have they given you any report of learning anything about this?

A. They just told me to, you know, be careful, try not to go out on the street in El Paso.

Q How long have you been engaged in this practice of informing, sir?

A. All together now?

Q Yes, how many years?

A. Since about 1965.

Q Twelve years?

A. '63. I think it was '63.

Q Twelve to fourteen years?

A. The first case I ever had was on an FBI case, '62, something like that.

Q Mr. Fuller has been telling us that you have been using heroin, sir, for some time I understand?

A. I have been using heroin since 1961 or '62. I haven't used anything in a month and a half, two months.

Q That was going to be my next question. You have answered it already, sir.

You have heard of this threat through two sources, sir?

A. Yes, sir.

Q One, a friend telling you that your life was in danger and to watch out?

A. Right.

Q And the other, you heard talk at a bar?

A. Just heard talk at a couble of bars actually.

Q A couple of bars?

A Yes.

Q Was your name mentioned in the talk?

A. They were talking. My name was mentioned. They were looking right at me.

Q. So, this was a face to face threat, then, I take it?

A. Well it wasn't fact to face, but they was as far as you from me.

Q You were listening?

A. Yes.

Q In other words --

A. In other words, it looked like they wanted me to hear it so I would leave town so, you know.

THE WITNESS: Where I testified in Court, Your Honor?

THE COURT: No, where you gave information?

THE WITNESS: Where I gave information?

THE COURT: That is right, to DEA and arrests were made as a result of your giving information?

THE WITNESS: I have got one case pending now, an arrest. It is in the Grand Jury. They are taking it to the Grand Jury.

THE COURT: How many times have you testified in Court?

THE WITNESS: I have testified once in Court and I have given information approximately 35 times.

THE COURT: Thirty-five times?

THE WITNESS: Something like that.

THE COURT: Did you disclose your true name in those cases?

THE WITNESS: That is always the understanding, I never have.

THE COURT: How did you give your name, as John Doe?

THE WITNESS: John Doe, yes, sir.

THE COURT: The Government put you on the stand in this way, is that it?

THE WITNESS: In the 35 cases, they did not put me on the stand. These were all Federal Court cases.

THE COURT: Well, I misunderstood. I thought you said you had testified?

THE WITNESS: I have only testified in one, Your Honor. I gave information in 35 other ones.

THE COURT: All right.

THE WITNESS: Approximately 35. I can't say definitely for sure.

THE COURT: Approximately how many of those resulted in convictions, sir?

THE WITNESS: I think 29 or 30 of them resulted in convictions.

THE COURT: Now, Mr. Atonna, you want to make some argument as to why his name should be disclosed?

MR. ATONNA: Yes, Your Honor. If the Court please, first of all, I would make the argument based upon waiver of secrecy. The name appears two times in the disclosure. One time where Mr. Doe has signed his true name to a photo lineup picture identifying Mr. Clark for the El Paso Police Department and another time on an evidence receipt to the El Paso Police Department where he signed the receipt. We submit that because of his changed way of life, that his activities no longer require the secrecy and anonymity that might be required if he were still what you would call a street person actively engaged in the informing business.

We also submit that the failure to disclose violates Arizona Constitution Article 2 Section 24 calling for Public Trials and also Amendment 6 to the United States Constitution.

John Doe is not an informer in this case. HHe is not an informer to which the traditional informer protections would apply. The traditional informer cases talk about protecting an informer who is acting as an informer in that case. The distinction here is that Mr. Doe is a material witness in this case. He just happens, as far as we are concerned, to have a sideline of being an informer, but he is not serving as an informer in this particular case. We also submit that the failure to order that he disclose his name in Court and testify as any other material witness would testify, would be a violation of the Confrontation Clause under the principles set forth in Smith Versus Illinois. We have discussed the Smith case in great detail in the previous motions we have filed some time ago. We respectively request that no special protection be allowed Mr. Doe, in fact, he be ordered to testify and disclose his true name in Court, as would any other material witness.

THE COURT: Mr. Kooper, in how many cases, can you tell us approximately, have you informed in?

THE COURT: Anything more, Mr. Atonna?

MR. ATONNA: I would be interested in knowing what name he used when he testified the one time and I would also be interested in knowing as a result of his, or his providing information previously if there has been any threats and if all of this has occurred within the El Paso area because if it has, it would seem as though he is pretty safe in El Paso or he wouldn't be there any longer.

THE COURT: Well, any one of these convicted individuals could have a friend. If they learned who it was through the disclosure, the name, his life could be in danger there in that way. I am disposed to allow him to testify in the courtroom under the name of John Doe.

MR. ATONNA: Would the Court inquire as to what name he used at the time he did testify?

THE COURT: What name did you use?

THE WITNESS: My original. It was in Washington, D.C. It was the first case I was ever arrested on.

THE COURT: The first case that you were arrested on?

THE WITNESS: 1962 or '63. Well, he has got it on the rap sheet.

THE COURT: The case in which you were convicted is the case in which you gave the information?

THE WITNESS: I was convicted on that case, Your Honor.

THE COURT: Well, I understood you to say it was the first case that you were convicted on?

THE WITNESS: No, it was the first case I was arrested on.

THE COURT: Excuse me. Well, I am still disposed to allow him to testify, to state his name as John Doe.

I will sustain any objection, Mr. Atonna, to any efforts to uncover his real name in the courtroom.

MR. FULLER: I will be objecting, I give Mr. Atonna notice

now, to the actual name of the religious retreat. I think that falls into the same category.

THE COURT: It does, if he doesn't want to give the name.

Furthermore, I would like to tell you, gentlemen, that I issued an order about half an hour or so ago that no photography was to be taken in connection with this trial in the courthouse and no pictures to be taken of Court personnel, witnesses, et cetera.

MR. FULLER: One other thing, Your Honor, I might bring this forward. Apparently he was mistaken when Detective Weick was telling me about Mr. Doe's prior convictions, but he is correct in that there are 4 convictions instead of the 2.

THE COURT: Does Mr. Atonna know about them.

MR. ATONNA: Yes.

THE COURT: You had a motion in limine not to go beyond 10 years. Did I make a specific ruling on that?

MR. FULLER: I don't remember, Your Honor.

THE COURT: All right. I am going to overrule your motion, deny your motion in limine. We really should get that on the Clerk's record.

MR. FULLER: I will withdraw my motion, then, because there are the 4, I really have no objection.

THE COURT: All right.

MR. ATONNA: Your Honor, there is a question of, Mr. Fuller had 3 down there. There was one, 3-66, violation of Federal Narcotics Laws. He said it was a felony charge but he thinks it was reduced to a misdemeanor, but he doesn't know for sure. That, of course, puts me in a --

MR. FULLER: That was the 3 months?

THE WITNESS: That was tried before U.S. Commission. The U.S. Commission can't try no felonies. They can only bind over to Grand Jury. I pled guilty to a misdemeanor. They can't bind over

on felonies.

THE COURT: Did I understand, Mr. Fuller, you said now that there were 4 felony convictions?

MR. FULLER: Yes, Your Honor. Mr. Doe will admit those.

THE COURT: He disclosed those to Mr. Atonna?

MR. FULLER: Yes, he has.

MR. ATONNA: If I understnad correctly, the Court will not permit me to delve into original felony charges that were dropped or reduced to misdemeanors merely because of deals he worked out as a result of his DEA informing?

THE COURT: Felony convictions is all we are allowed to show.

MR. ATONNA: Just so there is a record on it, I would object.

THE COURT: That is my ruling to restrict you to felony convictions.

MR. ATONNA: That is fine. The record will indicate my objection, then.

THE COURT: All right. If you want to get a record in the Clerk's minutes of this, remember this record here is going to be sealed and not opened unless there is an order of the Court.

MR. ATONNA: It will be available on Appeal, I am assuming?

THE COURT: As a sealed record also.

Is he going to be your next witness?

MR. FULLER: No, Your Honor, because Doctor Byers won't be on very long. We will put him on then we will put Mr. Doe on.

THE COURT: He is from Tucson?

MR. FULLER: I had asked him to come down earlier. I feel rather bad since he has been down since early this morning.

THE COURT: Mr. Atonna wants to quit at 10 minutes to 5:00. He wants to get to a ball game down there where they are going to swear in the new Council.

MR. FULLER: I think that with Doctor Byers on and off and with Mr. Doe on, we will finish up by then.

THE COURT: Let's get back in the courtroom.

****

STATE OF ARIZONA)
) ss.
COUNTY OF COCHISE)

I, SHARON MEREDITH, do hereby certify that as the OFFICIAL COURT REPORTER for COCHISE COUNTY that I was present at the foregoing proceedings; that while there I took down in shorthand all the oral testimony adduced and proceedings had; that the shourhand notes were transcribed under my directions; and that the foregoing 14 pages contain a full, true and correct transcript of the matter as set forth in the title page hereto.

Court Reporter

EXHIBIT C

J O H N D O E

was thereupon produced as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Come around and be seated behind the mike, sir.

D I R E C T E X A M I N A T I O N

BY MR. FULLER:

Q State your name for the purposes of these proceedings?

A. John Doe.

Q And, city wise, John Doe, where are you from?

A. El Paso, Texas.

Q And, your occupation is?

A. Paid informant for the DEA.

Q Drug Enforcement Administration?

A. Yes, sir.

C R O S S - E X A M I N A T I O N

BY MR. ATONNA:

Q Mr. Doe, in 1977, did you have any employment or occupation other than DEA informant?

A. No, sir.

Q When was the last time you worked and held a job other than DEA informant?

A. I don't remember.

Q Was it a matter of months ago, years ago?

A. Years.*

---

*The preceding is taken from the Trial Transcript of the testimony of John Doe, the State's principal witness against the Appellant, on the 14th day of June, 1978.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

JAMES DEAN CLARK,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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the State of Arizona

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QUESTIONS PRESENTED

I.(a) IS THERE A CONFLICT AMONG THE COURTS IN INTERPRETING SMITH v. ILLINOIS, 390 U.S. 129 (1968)?

I.(b) WAS PETITIONER DENIED THE RIGHT TO CROSS-EXAMINE "JOHN DOE" BECAUSE HE DID NOT GIVE HIS TRUE NAME AND ADDRESS TO THE JURY, WHEN PETITIONER KNEW HIS IDENTITY AND "JOHN DOE" WAS IMPEACHED AND PLACED IN HIS PROPER SETTING DURING HIS TESTIMONY?

II.(a) DOES MERELY QUESTIONING PROSPECTIVE JURORS ABOUT THEIR VIEWS ON CAPITAL PUNISHMENT DENY PETITIONER AN IMPARTIAL JURY?

II.(b) HAS THERE BEEN A VIOLATION OF THE STANDARDS SET OUT IN ADAMS v. TEXAS (1980) AND WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968), WHERE NO PROSPECTIVE JURORS WERE CHALLENGED FOR CAUSE BASED ON THEIR VIEWS ON THE DEATH SENTENCE?

III. PETITIONER WAS SENTENCED TO DEATH UNDER THE PROCEDURES OF ARIZ.REV.STAT.ANN. § 13-454. PRIOR TO SENTENCING, A PORTION OF THE STATUTE WAS FOUND UNCONSTITUTIONAL AND SEVERED. MAY PETITIONER BE SENTENCED UNDER THE JUDICIALLY CORRECTED STATUTE WITHOUT VIOLATION OF THE EIGHTH AMENDMENT, THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, AND THE EX POST FACTO GUARANTEES OF THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

In the early morning hours of December 4, 1977, petitioner murdered four people: his employers at a dude ranch, Mildred and Charles Thumm, and his friends and co-workers at the ranch, Gerry McFerron and George Martin. Petitioner stabbed George Martin repeatedly in the chest, damaging his heart and lungs, as Martin lay in his bed in the wrangler's quarters. (R.T. of June 14, 1978, at 1165-66.) Seventeen-year-old Gerry McFerron died of three gunshot wounds to the head. (Id. at 1163-64.) Petitioner then went up to the main house. In the hallway, he fired a shot at Charles Thumm's chest which exited his back. He fired a second shot which passed through Mr. Thumm's left

shoulder and left buttock, as he slumped forward after the first shot. Petitioner then executed Mr. Thumm, firing the third shot through the top of his head from a distance of 3 to 4 inches. (Id. at 1242-43.) Petitioner went into the bedroom where Mildred Thumm lay in bed. He fired a shot through her temple from a distance of 2 to 6 inches, took her rings, and retrieved as a souvenir the bloody bullet core, which had passed through her head. (Id. at 1244; R.T. of June 16, 1978, at 1403.)

Petitioner also took credit cards, cash, weapons, a saddle, an eight-track tape deck, and a station wagon from the ranch. He slashed tires on other vehicles before he left for El Paso, Texas. (R.T. of June 16, 1978, at 1427, 1436-37; R.T. of June 20, 1978, at 1579-80.)

In El Paso, petitioner met "John Doe," who bought heroin from him and helped him sell the guns and rings. (R.T. of June 14, 1978, at 1177, 1181-82; R.T. of June 15, 1978, at 1249.) Petitioner told John Doe he had killed three people in Arizona, and stated "You should have seen Charlie when I hit him with the Wad Cutters." (R.T. of June 14, 1978, at 1181-83.)

At petitioner's preliminary hearing, John Doe wore a ski mask and did not give his true name and address. He did remove the mask at one point and looked at petitioner, who looked back at him. (Id. at 1216-17.) At a pretrial hearing, the prosecutor furnished petitioner the true name of John Doe, his date of birth, and address. (R.T. of Apr. 7, 1978, at 2-3.) The trial court ordered that this information not be released to the public, nor revealed at trial, and ordered that the state disclose a copy of John Doe's F.B.I. rap sheet. (Id. at 3, 10.) On May 4, 1978, the trial court directed the prosecutor to have the

sheriff's office determine which offenses on John Doe's rap sheet were felonies, and stated it would permit impeachment with all offenses appearing on the list, if the felony designation was not accomplished. (R.T. of May 4, 1978, at 11.)

Prior to John Doe's testimony before the jury, John Doe stated his true name, which also appeared twice in the state's disclosure, and his location in El Paso, for which no street address exists. (Sealed Record of June 14, 1978, at 2, 6.) He testified he felt his life was in danger, and had received threats because he was a paid informant for the Drug Enforcement Administration. (Id. at 3-6.) The state provided petitioner with John Doe's felony convictions. (Id. at 11.) John Doe did not give his true name or address while testifying before the jury.

The jury found petitioner guilty of the four counts of first degree murder. Petitioner received a sentence of death, after the aggravation-mitigation hearing. The Arizona Supreme Court affirmed the judgment and sentence. State v. Clark, ___ Ariz. ___, 616 P.2d 888 (1980).

ARGUMENT

I

THERE IS NO TRUE CONFLICT AMONG COURTS IN THE INTERPRETATION OF SMITH V. ILLINOIS, 390 U.S. 129 (1968), AND PETITIONER'S CASE IS A POOR VEHICLE FOR REVIEW OF THAT DECISION BECAUSE HE CAN SHOW NO PREJUDICE RESULTING FROM "JOHN DOE'S" REFUSAL TO GIVE HIS TRUE NAME AND ADDRESS TO THE JURY.

Petitioner contends there is a conflict between the Federal Circuit Courts and state supreme courts in interpreting Smith v. Illinois, 390 U.S. 129 (1968). However, a review of the many cases cited by petitioner clearly shows there is great uniformity among the decisions

of the courts in holding that there is no per se constitutional requirement that a witness' name and address must be disclosed, and that potential danger to the witness may outweigh the defendant's need for the information to otherwise place the witness in his environment before the jury. McGrath v. Vinzant, 528 F.2d 681 (1st Cir.), cert. dismissed, 426 U.S. 902 (1976); United States v. Baker, 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970); United States v. Alston, 460 F.2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972); United States v. Conder, 423 F.2d 904 (6th Cir. 1979); United States v. Penick, 496 F.2d 1105 (7th Cir.), cert. denied, 419 U.S. 897 (1974); Caldwell v. Minnesota, 536 F.2d 272 (8th Cir. 1976); United States v. Rangel, 534 F.2d 147 (9th Cir.), cert. denied, 429 U.S. 854 (1976); United States v. Snaldone, 484 F.2d 311 (10th Cir.), cert. denied, 415 U.S. 915 (1974).

Petitioner's further contention that the Arizona Court incorrectly concluded that there must be potential danger from the defendant and no other person is also without merit. There is no logical reason to make this distinction, and the courts have not done so, contrary to petitioner's contentions. If a witness has demonstrated that danger from any person could result from public disclosure of his identity or address, and the defendant is not prejudiced if the trial court gives the witness this protection, there can be no argument that the right to cross-examine witnesses was denied. See United States v. Hansen, 569 F.2d 407 (5th Cir. 1978) (danger from other coconspirators); United States v. Baker, supra (danger from one of the codefendants); United States v. Conder, supra (fear of reprisal in general because of testimony for the government); United States v. Alston, supra (danger because

of continuing activity as an undercover agent and witness in other pending trials).

Finally, even if this Court were inclined to reconsider its holding in Smith v. Illinois, this case would be a poor vehicle for doing so because petitioner can show absolutely no prejudice from the trial court's ruling. Even though "John Doe" did not state his true name on the record of the preliminary hearing, his identity was not withheld from petitioner. John Doe removed the mask at one point and looked at petitioner. The state later disclosed John Doe's true name, location, and rap sheet. The trial court ordered the sheriff's office to determine which offenses on the rap sheet were felonies, or it would allow petitioner to impeach John Doe's credibility with all offenses appearing on the sheet. There was, therefore, no prejudice resulting from withholding John Doe's true name and address at the preliminary hearing.

The trial court held an in camera hearing to determine whether John Doe should be required to reveal his true identity to the jury. (Sealed Record on June 14, 1978.) John Doe testified he felt his life was in danger because he was a paid informant for the Drug Enforcement Administration. He also stated he had received threats to his life because of these activities. There was no address for the religious retreat he had joined.

Before the jury, he testified he was a paid informant for the Drug Enforcement Administration, and he was from El Paso, Texas. (R.T. of June 14, 1978, at 1175-76.) He also testified he was presently living in a religious retreat, and had used heroin in the past. (Id. at 1176.) John Doe revealed his felony convictions, and stated he met appellant at the Playmate Bar in El Paso, Texas, on

December 4, 1977. (Id. at 1177.) He purchased heroin, and sold some guns for appellant the next day. (Id. at 1181-82.)

Clearly, John Doe was "placed in his proper setting." The in camera hearing established that the state's representations that John Doe's identity and residence should be protected were not groundless. Petitioner was provided abundant evidence for impeachment, and his cross-examination in this area was not restricted. There was no denial of his right to confront and cross-examine witnesses.

ARGUMENT

II

PETITIONER'S ISSUE ON THE JURY VOIR DIRE WARRANTS NO REVIEW BECAUSE NO JURORS WERE CHALLENGED FOR CAUSE BASED ON THEIR OPINIONS ABOUT THE DEATH SENTENCE, AND PETITIONER DID NOT ATTEMPT TO ESTABLISH THAT A DEATH-QUALIFIED JURY IS MORE LIKELY TO FIND GUILT.

Petitioner claims it is a violation of equal protection and due process for the trial court to ask the jury voir dire questions regarding their beliefs about capital punishment where the jury does not impose sentence.[1] Petitioner does not claim that jurors were improperly

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1. Petitioner apparently does not argue that there is evidence in the record to show a death-qualified jury is more likely to convict than a jury selected without regard for jurors' scruples against the death penalty, and no record was made in this case to prove the conviction propensities of death-qualified jurors. See Bumper v. North Carolina, 391 U.S. 543, 545 (1968); Witherspoon v. Illinois, 391 U.S. 510, 517-18 n.11 (1968); Spinkellink v. Wainwright, 578 F.2d 582, 593-95 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

excluded from the panel of prospective jurors because of their beliefs, but objects solely to the asking of the voir dire questions. He overlooks the fact that Witherspoon v. Ilinois, 391 U.S. 510 (1968), and the line of cases following it, deal with the unconstitutional exclusion of jurors based on their beliefs about the death penalty. Recently, in Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), this Court summarized the constitutional standard as follows:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

___ U.S. at ___, 100 S.Ct. at ___, 65 L.Ed.2d at 589 (emphasis added).

In this case, the following excerpt is representative of the voir dire conducted with each prospective juror:

> Q. [BY THE COURT:] Now, there is another phase of Arizona Law that I want to discuss with you for a minute. I will explain something to you then I have a question to ask you. Under Arizona Law the Judge has the responsibility of deciding whether the penalty imposed will be life imprisonment or death, and of course, the Judge makes that decision only if the Jurors return a verdict of guilty of murder in the first degree in any one of the verdicts sent to the Jury. Okay, sir?
>
> A. [BY A JUROR:] Yes.
>
> Q. Now, do you have any conscientious objections against the death penalty?
>
> A. No, sir.

Q. What we refer to commonly as Capital punishment, you understand that, don't you, sir?

A. Yes.

Q. Do you have any feelings, on the other hand, that because you have no objections to the death penalty that you are inclined to want to return a verdict of first degree murder in this or any other case simply because you know that that will set the stage whereby the Judge might be in a position to return a penalty of death rather than life imprisonment?

A. No, sir.

Q. Okay, sir. You understand that the Judge makes this decision and the Jury has no responsibility in that matter at all?

A. Yes, sir.

Q. Now, the Judge makes this decision after a hearing at a later date following, during which hearing I should say, the Defendant has an opportunity to present any testimony that he wants of any mitigating nature whatsoever?

A. Yes.

Q. Okay. Does this make any difference to you at all?

A. No, sir.

Q. Do you think you could decide this case based solely on the evidence and the instructions as to the law which the Court will give to you, if you are selected as one of the 12 Jurors, sir?

A. Yes, sir.

(R.T. of June 7, 1978, at 410-11.) Clearly, the questions were designed to determine if the prospective jurors could consider and decide the facts impartially and follow the law as instructed by the court. Not one juror was excluded for cause because of his views on the death penalty. In fact, the jurors who expressed concern or reservations about capital punishment were not challenged for cause.

(R.T. of June 8, 1978, at 546-48; R.T. of June 9, 1978, at 858-66, 869-71, 889-90.)

Because no jurors were excluded from the panel of prospective jurors, there was no violation of the constitutional principles set out in Witherspoon and Adams, and petitioner's contentions are without merit.

ARGUMENT

III

THERE BEING NO TRUE CONFLICT AMONG COURTS, NO EX POST FACTO VIOLATION, AND A VALID SEVERANCE OF THE STATUTE, PETITIONER PRESENTS NO SUBSTANTIAL CHALLENGE TO THE SENTENCING PROCEDURES UTILIZED.

A. The Arizona Court properly severed subsection F of Ariz.Rev.Stat.Ann. § 13-454 (1973).

In Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978), the court held that, because Arizona's death penalty statute was too restrictive in terms of the mitigating circumstances that the trial court could consider, the statute was invalid to that extent. Later that year, the Arizona Supreme Court held that the constitutional and unconstitutional portions of Arizona's death penalty statute were severable, and that the constitutional portion remained in full force and effect. State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), cert. denied, 440 U.S. 924 (1979). The Watson Court then remanded the case for resentencing in order to give Watson the opportunity to present any evidence in mitigation. (Id.)

Petitioner assails the Arizona Supreme Court's action as a judicial "rewriting" of the statute. Petitioner fails to note that, when the Arizona Legislature did amend the statute on May 1, 1979, it amended it in a fashion that was wholly consistent with the Arizona Supreme Court's language and holding in Watson. In any event, the Arizona Supreme

Court correctly held that the statute was severable. In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), this Court held that the Federal Kidnapping Act was not entirely invalid merely because the punishment clause violated the Fifth and Sixth Amendments to the United States Constitution. In so holding, this Court reiterated the following language employed in Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed.2d 1062 (1932):

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

286 U.S. at 234. The Jackson Court went on to note as follows:

> The clause in question is a functionally independent part of the Federal Kidnapping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravating kidnapping cases would have chosen to disgard the entire statute if informed that it could not include the death penalty clause now before us.

390 U.S. at 586. Similarly, there is no reason to believe that the Arizona Legislature would have done away with Arizona's death penalty if it had known that the original penalty provision was invalid. The Arizona Supreme Court properly held that the statute was severable. See also Buckley v. Valeo, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659, 739 (1976); Harrison v. NAACP, 360 U.S. 167, 178, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152, 1159 (1959).

B. Petitioner's constitutional protection against ex post facto laws has not been violated.

Because petitioner was convicted before Watson was decided and sentenced pursuant to Watson, he contends there has been a violation of the guarantee against ex post facto laws. He claims that chapter 138, § 10, Laws 1973, requires that he be given a life sentence. The provision relied on by petitioner states as follows:

> In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of 25 calendar years.

Petitioner's analysis does not take into account the fact that the Arizona Supreme Court did not hold that the death penalty itself was unconstitutional, it held only that the procedure to determine the sentence was unconstitutional. The single flaw discovered in Arizona's death penalty statute was a limitation on the factors which a defendant could introduce in mitigation of the death penalty. Once petitioner's "severability" argument is rejected, as the aforementioned authorities suggest it should be, his ex post facto claim has no merit. Section 10 never came into play, and thus petitioner should not have received a life sentence by operation of law. Petitioner was sentenced to death under a statute that passed constitutional muster except with respect to one aspect of the penalty clause. That clause was severable from the remainder of the statute. Petitioner was then given the opportunity to present any and all circumstances in mitigation of his offenses. He was sentenced to death. Although petitioner's argument might have merit if the entire

statute, or at least a nonseverable portion of the statute, had been declared unconstitutional, the argument has no merit under these circumstances. It is clear that, despite the unconstitutional limitation on mitigation evidence (which was severed), there was a death penalty "in effect" when petitioner committed the crimes, so a hearing in which a death sentence may be imposed envisions no new, different, or harsher penalty than the one petitioner faced from the beginning. Dobbert v. Florida, 432 U.S. 282 (1977); Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). Hence, the prohibition against ex post facto laws does not apply.

In sum, there is no true conflict in decisions between state courts, and no ex post facto violation. There is no substantial reason for granting certiorari on these issues.

C. The question of the constitutionality of State v. Watson has been decided adversely to petitioner by the federal district court, and is presently pending on appeal in the Ninth Circuit.

On April 18, 1980, the federal district court entered its opinion upholding the constitutionality of the decision in Watson. Knapp v. Cardwell, No. CIV. 78-385 PHX. (CAM) (D.Ariz., Apr. 18, 1980). This case is a class action involving petitioner and 29 other inmates presently on death row.[2] The decision by the federal district court has been appealed, and is presently pending before the Ninth Circuit Court of Appeals. Knapp v. Cardwell, No.

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2. Included in this group of 30 inmates are five inmates who have had their petitions for certiorari denied by this Court: Carriger v. Arizona, 444 U.S. 1049 (1980); Evans v. Arizona, No. 79-6752 (U.S., Oct. 6, 1980); Steelman v. Arizona, No. 80-5252 (U.S., Oct. 14, 1980); Mata v. Arizona, No. 80-5228 (U.S., Oct. 20, 1980); Jordan v. Arizona, No. 80-5399 (U.S., Nov. 10, 1980).

80-5419 (9th Cir., filed May 10, 1980). Respondent submits that, if this Court should want to review the Watson decision, it would be more advantageous to do so after the Ninth Circuit issues its opinion.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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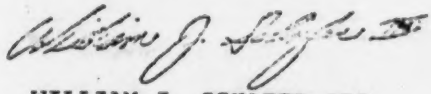

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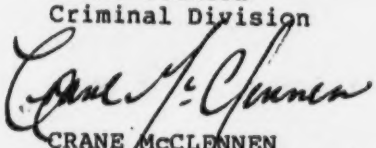

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